

**United States Small Business Administration
Office of Hearings and Appeals**

SIZE APPEAL OF:

Diversified Global Partners JV LLC

Appellant

Appealed from
Size Determination No. 2-2008-51

SBA No. SIZ-4967

Decided: June 19, 2008

APPEARANCES

John E. Jensen and Orest J. Jowyk, Pillsbury Winthrop Shaw Pittman LLP, McLean, Virginia, for Appellant.

Bruce Larsen, President, Omitron, Inc., Beltsville, Maryland, for Omitron, Inc.

DECISION

HOLLEMAN, Administrative Judge:

I. Jurisdiction

This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

II. Issue

Whether the size determination was based on clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Background

A. The Procurement and Protest

On March 27, 2007, the Department of Commerce, National Oceanic and Atmospheric Administration (NOAA) issued Solicitation No. EA133F-07-RP-0041 to provide information technology services in support of the NOAA Comprehensive Large Array-data Stewardship System. The Contracting Officer (CO) set the procurement totally aside for small business and assigned North American Industry Classification System (NAICS) code 541512, Computer

Systems Design Services, with a corresponding \$23 million annual receipts size standard. Final revised proposals were due on January 22, 2008.

On February 13, 2008, the CO notified the unsuccessful offerors that Diversified Global Partners JV LLC (Appellant) was selected for award. Appellant is a joint venture between Global Science & Technology, Inc. (Global Science) and DB Consulting Group, Inc. (DB).

On February 20, 2008, an unsuccessful offeror, Omitron, Inc., (Omitron), filed a size protest with the CO. Omitron asserted Global Science and DB are affiliated, despite participating in the SBA Mentor-Protégé (MP) program. Omitron asserted Global Science, the mentor, is a large business, as well as the incumbent contractor for the instant procurement. Omitron states DB, the protégé, fails to contribute resources or experience to the joint venture, other than its 8(a) Business Development (BD) program status. Moreover, Omitron alleges Appellant's proposed project manager is an employee of the mentor, Global Science, and that DB is financially dependent on Global Science.

On February 21, 2008, the CO forwarded the size protest to the Small Business Administration (SBA). SBA's Office of Government Contracting - Area 2 (Area Office), in Philadelphia, Pennsylvania processed the size protest.

B. The Size Determination

On April 8, 2008, the Area Office issued its size determination. The Area Office reviewed tax returns for DB for 2006, 2005, and 2004 and found DB's average revenues to be below the applicable size standard for the NOAA procurement. The Area Office stated DB and Global Science have a joint venture established in accordance with the SBA 8(a) MP program, 13 C.F.R. § 124.520. The Area Office noted that certain joint ventures, including 8(a) MP joint ventures, are exempt from a finding of affiliation, under 13 C.F.R. § 121.103(h)(3)(iii).

However, the Area Office, relying on *Size Appeal of Lance Bailey & Associates, Inc.*, SBA No. SIZ-4788 (2006), stated, even though there is an approved joint venture, the Area Office is obligated to determine if the joint venture is in accordance with 13 C.F.R. § 124.513(c). The Area Office acknowledged, unlike the procurement in *Size Appeal of Lance Bailey & Associates, Inc.*, the NOAA procurement is a small business set-aside, not an 8(a) set-aside.

The Area Office reviewed Appellant's joint venture agreement which is also Appellant's operating agreement. The Area Office found Appellant's joint venture is not exempt from affiliation because the joint venture agreement indicates a Global Science employee will be the project manager for the instant procurement and the operating agreement gives the mentor the power to control through negative control.

The Area Office also reviewed DB's expertise. The Area Office stated DB has performed IT contracts and DB's capabilities would be enhanced by the instant procurement. However, the Area Office noted DB's lack of involvement in the present procurement: no key employee is a previous DB employee; the project manager is not a DB employee; no current DB employees are involved in the procurement, other than the transition manager; and all employees

for the instant procurement worked for Global Science or Computer Sciences Corporation, Global Science's subcontractor.

Based on its review, the Area Office determined DB is only bringing its 8(a) BD status to the procurement. The Area Office deemed Appellant other than small for this procurement due to Global Sciences "ability to control and non-compliance with requirements of the [joint venture] agreement." Size Determination, at 17.

C. The Appeal

On April 23, 2008, Appellant filed the instant appeal. Appellant argues the Area Office erroneously determined Appellant to be other than a small business based on a regulation specific to 8(a) procurements even though the NOAA procurement is not an 8(a) procurement. First, Appellant enumerates numerous reasons why 13 C.F.R. § 124.513 relates only to 8(a) procurements. Second, Appellant asserts the affiliation rules demonstrate 13 C.F.R. § 124.513 is inapplicable to the non-8(a) NOAA procurement because 13 C.F.R. § 121.103(h)(3) sets forth separate affiliation rules for 8(a) procurements and for MP joint ventures pursuing any federal government procurement. Third, Appellant states the Area Office exclusively relied on case law that involves 8(a) procurements, rather than cases involving small business set-aside contracts. Fourth, Appellant argues there is no logical reason to extend 13 C.F.R. § 124.513 to 8(a) procurements.

Additionally, Appellant alleges the Area Office improperly considered other factors inapplicable to a MP joint venture proposal for a non-8(a) procurement. Appellant argues the Area Office erred in analyzing the assistance the mentor provides the protégé, the protégé's level of expertise, and the mentor's ability to control the joint venture.

D. Omitron's Response

On May 13, 2008, Omitron responded to Appellant's Appeal. Omitron argues if Appellant's Appeal is granted it will have a devastating impact on small businesses that compete with 8(a) firms joint venturing with their mentors to pursue small business set-asides. Omitron asserts, while the regulations exempt 8(a) MP joint ventures, the regulations are not meant to give 8(a) MP participants the opportunity to enter into arrangements that benefit large businesses.

Omitron alleges that Global Science, the large incumbent, will use DB's 8(a) BD status to create the appearance that a small business has control over the joint venture. But, according to Omitron, Global Science will be the business to actually benefit from the NOAA procurement. Omitron cites the SBA's Office of the Inspector General's report, which recognizes that large businesses could abuse the 8(a) MP program to obtain small business set-aside contracts. Omitron argues if Appellant's Appeal is granted it will set a precedent allowing large businesses in MP joint ventures to control the joint venture and pursue small business set-asides.

Additionally, Omitron argues, even if Appellant is exempt from the affiliation regulations because the 8(a) joint venture regulations do not apply, Appellant's Appeal must be denied

because the size determination is based upon Global Science's negative control of the joint venture.

IV. Discussion

A. Timeliness

Appellant filed its appeal within 15 days of receiving the size determination and, therefore, the appeal is timely. 13 C.F.R. § 134.304(a)(1).

B. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the Area Office size determination is based on a clear error of fact or law. 13 C.F.R. § 134.314; *Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354, at 4-5 (1999). OHA will disturb the Area Office's size determination only if the administrative judge, after reviewing the record and pleadings, has a definite and firm conviction the Area Office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

C. The Merits

In general, businesses submitting an offer as a joint venture are affiliates with regard to that procurement and the businesses will be aggregated for the purposes of determining size. 13 C.F.R. § 121.103(h)(2). Additionally, when a subcontractor is performing vital and primary requirements of a contract, or a prime contractor is unusually reliant upon a subcontractor, the subcontractor is deemed to be an ostensible contractor and a joint venturer, and the firms are aggregated for the purposes of determining size. 13 C.F.R. § 121.103(h)(4).

Certain joint ventures, nevertheless, are exempt from a finding of affiliation. Specifically, one exception includes firms which are approved as mentor and protégé under 13 C.F.R. § 124.520. The purpose of the MP program is to encourage mentor firms to provide various forms of assistance to firms which are participants in SBA's 8(a) BD program. 13 C.F.R. § 124.520(a); *Size Appeal of American Security Programs*, SBA No. SIZ-4797, at 4 (2006).

In accordance with 13 C.F.R. § 121.103(h)(3)(iii), two firms approved by SBA to be a mentor and protégé may form a joint venture for any federal government procurement. The MP joint venture is immune from the normal rules of affiliation. 13 C.F.R. § 121.103(b)(6), (h)(3)(iii); *American Security Programs*, SBA No. SIZ-4797, at 4. The affiliation exemption continues as long as the protégé concern qualifies as small for the size standard applicable to the procurement. 13 C.F.R. § 121.103(h)(3)(iii). Moreover, the assistance which a mentor extends to its protégé under an approved joint venture agreement cannot be relied upon to make a finding of affiliation. 13 C.F.R. §§ 121.103(b)(6) & 124.520(d)(4); *American Security Programs*, SBA No. SIZ-4797, at 4.

In this case, Appellant is an 8(a) MP joint venture seeking to compete for a small business set-aside. Even though this is not an 8(a) procurement, the Area Office reviewed the joint venture agreement under 13 C.F.R. § 124.513; a regulation titled “Under what circumstances can a joint venture be awarded an 8(a) contract?”

The 8(a) BD program is a distinct government contracting program and OHA has consistently held that the 8(a) regulations do not apply to a procurement that is not within the 8(a) BD program. *Size Appeal SES-TECH Global Solutions*, SBA No. SIZ-4951 (2008), at 4-5; *Size Appeals of SETA Corporation and Federal Emergency Management Agency*, SBA No. SIZ-4477, at 10 (2002). The 8(a) BD program’s regulations apply to a size determination or size appeal only when the procurement is an 8(a) procurement. *Size Appeal SES-TECH Global Solutions*, SBA No. SIZ-4951 (2008), at 5; *Size Appeals of SETA Corporation and Federal Emergency Management Agency*, SBA No. SIZ-4477, at 10 (2002).

Thus, the Area Office erred in reviewing Appellant’s joint venture agreement for the NOAA procurement under an 8(a) regulation when the NOAA procurement is not an 8(a) procurement. The regulation specifically states that the joint venture may compete for any contract, exempt from the normal rules of affiliation. 13 C.F.R. § 121.103(h)(3)(iii). The Area Office relied on an inapplicable 8(a) regulation to find Appellant other than small.

The Area Office’s reliance on *Size Appeal of Lance Bailey & Associates, Inc.*, SBA No. SIZ-4788 (2006), is misplaced. Unlike, the non-8(a) NOAA procurement, *Lance Bailey & Associates, Inc.*, SBA No. SIZ-4788, involved an 8(a) procurement. Recently, in a factually similar case, OHA specifically found error when an area office applied an 8(a) regulation to a procurement unrelated to the 8(a) BD program. *Size Appeal SES-TECH Global Solutions*, SBA No. SIZ-4951 (2008), at 4-6. Moreover, OHA has held neither an area office nor OHA may review mentor-protégé eligibility issues involving the mentor-protégé agreement. *Size Appeal of White Hawk/Todd, A Joint Venture*, SBA No. SIZ-4950, at 3 (2008). Thus, the Area Office has no authority to review this mentor-protégé agreement and joint venture agreement under 13 C.F.R. § 124.513.

Accordingly, I find that the instant size determination was based on a clear error of law; the size determination applies an 8(a) regulation to a procurement unrelated to the 8(a) BD program. Appellant is an approved joint venture between an 8(a) protégé firm and its mentor and Appellant may compete for any federal government contract exempt from the affiliation rules. Moreover, the Area Office determined the 8(a) protégé is small for the applicable size standard. Therefore, I must REVERSE the size determination and find Appellant an eligible small business under 13 C.F.R. § 121.103(b), (h)(3)(iii).

V. Conclusion

For the above reasons, I REVERSE the Area Office’s size determination and find Appellant Diversified Global Partners JV LLC, an SBA-approved joint venture between the 8(a) protégé firm, DB, and its mentor, Global Science, is a small business for the instant NOAA procurement.

This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(b).

CHRISTOPHER HOLLEMAN
Administrative Judge